No. 08-1498 & 09-89

IN THE

Supreme Court of the United States

ERIC H. HOLDER, JR., Attorney General, *et al.*,
Petitioners and Cross-Respondents,
v.
HUMANITARIAN LAW PROJECT, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF JOHN D. ALTENBURG, Maj. Gen., US Army (Ret.), JAMES J. CAREY, Rear Adm., USN (Ret.), STEVEN B. KANTROWITZ, Rear Adm., USN (Ret.), THOMAS L. HEMINGWAY, Brig. Gen., USAF (Ret.), WASHINGTON LEGAL FOUNDATION, JEWISH INSTITUTE FOR NATIONAL SECURITY AFFAIRS, NATIONAL DEFENSE COMMITTEE, and ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

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QUESTIONS PRESENTED

18 U.S.C. § 2339B(a)(1) makes it a crime to "knowingly provide[ ] material support or resources to a foreign terrorist organization." The term "material support or resources" is defined as meaning, *inter alia*, "any . . . service, including . . . training, . . . expert advice or assistance, [and] personnel." 18 U.S.C. § 2339A(b)(1). The petition and cross petition raise three distinct questions:

(1) Are the prohibitions of § 2339B(a)(1) unconstitutionally vague with respect to the provision of "service," "training," "expert advise or assistance," or "personnel?"

(2) Do the prohibitions of § 2339(B)(a)(1) violate the First Amendment as applied to the types of speech in which Respondents/Cross-Petitioners wish to engage?

(3) Is §2339B(a)(1) unconstitutionally overbroad, and thus facially invalid, with respect to the provision of "service," "training," "expert advice or assistance," or "personnel."

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INTERESTS OF *AMICI CURIAE*

Amici curiae are four individuals who are retired generals or admirals in the U.S. armed forces, and several organizations with an interest in national security issues.[1]

Major General John Altenburg, U.S. Army (Ret.), served two years as an enlisted man and 28 years as an Army lawyer. His Military Justice and Combat Operations and Peacekeeping Law experience included service or legal oversight in Vietnam, Special Operations, Operation Desert Storm-Kuwait/Iraq, Operation Restore Hope-Somalia, Operation Uphold Democracy-Haiti, Operation Joint Endeavor/Guard-Bosnia, and Joint Guardian-Kosovo, followed by four years as the Deputy Judge Advocate General (1997-2001). He served as the Appointing Authority for Military Commissions from March 2004 to November 2006.

Rear Admiral James J. Carey, U.S. Navy (Ret.), served 33 years in the U.S. Navy and Naval Reserve, including service in Vietnam. He is a former Chairman of the U.S. Federal Maritime Commission and current Chairman of the National Defense Committee (NDC), which is also joining in this brief. The NDC is a grass roots pro-military organization supporting a larger and stronger military and the election of more veterans to

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to this filing; letters of consent have been lodged with the Court.

the U.S. Congress.

Rear Admiral Steven B. Kantrowitz, U.S. Navy (Ret.), served on active duty and in the Reserve of the U.S. Navy from September 1974 through January 2005. He retired as a Rear Admiral in the Judge Advocate General's Corps. During active duty, he served as a judge advocate performing duties involving the full reach of military law practice. This includes service for three years as Special Assistant and Aide to the Judge Advocate General of the Navy. At the time of his selection to flag rank, he served as commanding officer of an international and operational law unit. As a Flag officer, he served as the Assistant Deputy Advocate General of the Navy and Deputy Commander, Naval Legal Service Command.

Brigadier General Thomas L. Hemingway, U.S. Air Force (Ret.), served at the time of his retirement in May 2007 as the Legal Advisor to the Convening Authority in the Department of Defense Office of Military Commissions. He was commissioned as a second lieutenant in 1962 and entered active service in 1965 after obtaining a law degree. He has served as a staff judge advocate at the group, wing, numbered air force, major command, and unified command level. He was also an associate professor of law at the U.S. Air Force Academy and a senior judge on the Air Force Court of Military Review.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's national

security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Boumediene v. Bush,* 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006); *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004); *Rasul v. Bush,* 542 U.S. 466 (2004). WLF also filed a brief in this matter when it was before the court of appeals.

The Jewish Institute for National Security Affairs (JINSA) is a non-profit, non-partisan educational organization committed to explaining the need for a prudent national security policy for the United States, addressing the security requirements of both the U.S. and the State of Israel, and strengthening the strategic cooperative relationship between these two democracies.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

Amici are concerned that the Ninth Circuit's decision, if allowed to stand, could significantly impair the federal government's ability to counter the threat to national security posed by foreign terrorist groups. Congress has determined that the threat posed by such groups is magnified by the support they have been able to garner from within the United States; it has adopted

legislation designed to cut off such support. *Amici* believe that Congress is acting well within its powers by authorizing the imposition of criminal sanctions on those who provide material support for such groups, regardless of the form in which that support is given. *Amici* further believe that Congress has spoken with sufficient clarity to make clear to a person of ordinary intelligence the scope of the prohibition: Congress has prohibited virtually all support for foreign terrorist groups, provided that the support is "material" and is given directly "to" the groups.

STATEMENT OF THE CASE

Congress has authorized the Secretary of State to designate an organization as a "foreign terrorist organization" (FTO) if, *inter alia*, the organization engages in terrorist activity and that activity "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1). If an organization has been so designated, it is a serious criminal offense to "knowingly provide material support or resources" to the organization. 18 U.S.C. § 2339B(a)(1).

Among the organizations that the Secretary of State has designated as FTOs are the Kurdistan Workers Party ("Partiya Karkeran Kurdistan" or "PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). Despite that designation, Respondents/Cross-Petitioners (six organizations and two U.S. citizens) seek to provide material support to those terrorist groups. Respondents contend that they do not seek to support PKK's and LTTE's terrorist activities;

rather, they assert a desire to provide material support for the groups' lawful humanitarian and political activities. They filed two suits in U.S. District Court for the Central District of California, seeking to enjoin the federal government from initiating criminal proceedings against them for providing such support. The suits alleged, *inter alia,* that several of the statutory terms used to define what constitutes the provision of "material support or resources" – including "training," "expert advice or assistance," "service," and "personnel" – were impermissibly vague, in violation of the Fifth Amendment, because they fail to provide people of ordinary intelligence with a clear understanding of what activities are impermissible. The suits also alleged that those same statutory terms violated their First Amendment rights.

Before this Court, Respondents challenge § 2339B only with respect to a very limited set of activities: they seek to speak with the leadership of PKK and LTTE, principally for the purpose of providing advice regarding how to facilitate a peaceful settlement of their political disputes and how to seek redress for human rights violations.

In the lower courts, however, Respondents' challenge was far broader. Respondents Humanitarian Law Project (HLP), Ralph Fertig, and other individuals associated with HLP (the "HLP Respondents") sought the right to: (1) solicit and contribute funds for PKK's "political work" on behalf of Kurds' human rights and its humanitarian assistance to Kurdish refugees; (2) advocate on PKK's behalf before the UN Commission on Human Rights and the U.S. Congress; (3) write and

distribute publications supportive of PKK and the cause of Kurdish liberation; (4) advocate for the freedom of Turkish political prisoners convicted of being PKK members or supporters; and (5) provide lodging to PKK members while they attend peace conferences and similar meetings. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1205, 1209 (C.D. Cal. 1998). The remaining Respondents (four organizations and two individuals, collectively, "the Sangram Respondents") sought the right to: (1) donate food and clothing to a branch of LTTE engaged in economic development activities; (2) donate school supplies and other educational materials to a branch of LTTE engaged in education; (3) donate money to fund LTTE's non-violent activities, particularly orphanages operated by LTTE; (4) distribute LTTE literature here in the United States; and (5) donate money to LTTE to be used to provide humanitarian assistance to Tamils living in Sri Lanka. *Id.* at 1209-1211.[2] None of the Sangram Respondents complained that federal law was preventing them from engaging in any "pure speech."

As set forth in detail in the Brief of the United States, the cases have a lengthy procedural history – including three separate appeals to the Ninth Circuit. In December 2004, Congress adopted the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638, which amended several of the statutory provisions challenged

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[2] Following the December 2004 tsunami that devastated Sri Lanka, the Sangram Respondents expressed particular interest in providing funds to LTTE so that LTTE could provide aid to Tamil tsunami victims.

by Respondents. Following adoption of IRTPA, the appeals court vacated an earlier injunction issued by the district court against enforcement of portions of 18 U.S.C. § 2339B, and remanded the cases to the district court for reconsideration in light of the IRTPA amendments.

On remand, the district court consolidated the two cases and largely duplicated its prior rulings. Pet. App. 33a-76a. It held that three of four challenged statutory terms were impermissibly vague: "training," "expert advice or assistance," and "service."[3] It held that the 2004 IRTPA amendments failed to cure the vagueness concerns expressed by the court in prior decisions with respect to the first two terms, and that "service," a term added for the first time by IRTPA, suffered from similar vagueness problems. *Id.* at 60a-68a. It enjoined the United States from prosecuting Respondents under § 2339B based on any one of those three terms.

The district court denied a vagueness challenge to a fourth statutory term: "personnel." It held that IRTPA had cured the previously identified deficiencies in the definition of "personnel" by providing "fair notice" of the prohibited conduct. *Id.* at 69a. The district court also rejected all First Amendment claims.

The Ninth Circuit affirmed. *Id.* at 1a-32a. It

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[3] The challenged terms are among a laundry list of items included within the definition of "material support or resources," 18 U.S.C. § 2339A(b)(1), the provision of which to an FTO is prohibited by 18 U.S.C. § 2339B(a)(1).

held that the term "training" (defined under IRTPA as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," 18 U.S.C. § 2339A(b)(2)) was impermissibly vague because a person of ordinary intelligence would not know whether the conduct contemplated by Respondents constituted "training" and thus the unlawful provision of "material support." *Id.* at 21a-23a.[4] The court also held that even if a person of ordinary intelligence could differentiate between instruction that imparts a "specific skill" and instruction that imparts "general knowledge," it would still be unconstitutionally vague because, as so defined, "the term 'training' could still be read to encompass speech and advocacy protected by the First Amendment." *Id.* at 22a.

The appeals court held that the term "expert advice or assistance" (defined under IRTPA as advice or assistance derived from "scientific, technical, or other specialized knowledge," 18 U.S.C. § 2339A(b)(3)) was impermissibly vague, at least with respect to the "other specialized knowledge" portion of the ban. *Id.* at 24a. The court held that that portion of the ban was void for vagueness because it: (1) was not "reasonably understandable to a person of ordinary intelligence"; and (2) "continue[d] to cover constitutionally protected advocacy." *Id.*

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[4] The court held that a person of ordinary intelligence would not know whether the following contemplated conduct was prohibited: "teaching someone to petition international bodies for tsunami related aid" and "instruct[ing] members of a designated group on how to petition the United Nations to give aid to their group." *Id.* at 21a-22a.

The appeals court also held that the term "service" encompassed both "training" and "expert advice or assistance" and thus was constitutionally flawed for the same reasons that those other terms were flawed: a person of ordinary intelligence would not know whether his contemplated conduct constituted "service," and "'it is easy to imagine protected expression that falls within the bounds' of the term 'service.'" *Id.* at 25a (quoting district court decision, *id.* at 67a).

The appeals court affirmed the district court's rejection of Respondents' void-for-vagueness challenge to the term "personnel." *Id.* at 26a-27a. The court also affirmed the district court's rejection of Respondents' First Amendment overbreadth challenge to the terms "training," "expert advice and assistance," "service," and "personnel." The court stated that while Respondents "may be able to identify particular instances of protected speech that may fall within the statute," those instances "are not substantial" when compared to the many legitimate applications of § 2339B. *Id.* at 29a.

The Court granted a petition for review filed by Petitioners (the "United States") and a cross-petition filed by Respondents. In their cross-petition, Respondents make clear that they have abandoned their claim that the First Amendment protects their right to engage in expressive conduct (*e.g.*, the contribution of cash and supplies to FTOs); their claim before the Court relates solely to an alleged right to engage in "pure speech" (*i.e.*, communication expressed solely through oral or written words) in support of FTOs.

SUMMARY OF ARGUMENT

In challenging § 2339B on vagueness and First Amendment grounds, Respondents supply a laundry list of expressive activities that they assert are barred, or could reasonably be understood as barred, by the statute. In fact, the statute's application to expressive activities is far more limited than Respondents suggest. In general, activities are barred by the statute if and only if: (1) they involve direct interaction with an FTO (as opposed to independent activities designed to support the FTO or its goals); (2) they benefit the FTO in some way; and (3) the benefit provided is "material" (*i.e.*, significant). Those guidelines are sufficient to provide people of ordinary intelligence a reasonable opportunity to understand what activities are prohibited, and thus the statute is not void for vagueness.

The Ninth Circuit's vagueness analysis went awry because it focused on the wrong portion of the statute. The issue before the Court is whether § 2339B(a)(1) is overly vague. But instead of focusing on the language contained in § 2339B(a)(1) (the prohibition against knowingly providing "material support or resources" to an FTO), the appeals court focused on the extensive statutory definitions that attempt to provide guidance regarding the meaning of "material support or resources." It construed those definitions as though they imposed 15 or more separate prohibitions and then faulted Congress for failing to provide an adequate definition for each of those separate offenses. The more appropriate statutory construction method is to consider the statute as a whole and to assume (applying the

noscitur a sociis canon) that the definitional terms have a common purpose and are given meaning by the neighboring words of the statute. When that approach is adopted, any apparent vagueness in § 2339B readily disappears.

Nor does § 2339B violate Respondents' First Amendment rights. The statute is content-neutral – Congress's only purpose in adopting the statute was to stop material aid from reaching FTOs, and it did not care what message Respondents and others wished to convey. Respondents' proposed actions do not warrant strict First Amendment protection simply because their proposed conduct (the provision of material support to terrorist groups) is to be carried out by means of spoken or written words. The Court has long recognized that the First Amendment does not protect those who use words to carry out a criminal enterprise.

Because § 2339B is content-neutral, any incidental restrictive effects that it has on speech are to be judged under the intermediate standard of review set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). The statute easily passes that test; in particular, the United States has demonstrated that those incidental speech restrictions are no greater than necessary to maintain national security.

Both Congress and the Executive Branch have determined that § 2339B plays a critical role in protecting the Nation from terrorism. *Amici*, several of whom have first-hand knowledge of the grave threat to national security posed by foreign terrorist organizations, urge the Court not to second-guess that

determination.

ARGUMENT

I. SECTION 2339B DOES NOT PROHIBIT MANY OF THE ACTIVITIES IN WHICH RESPONDENTS SEEK TO ENGAGE

In challenging § 2339B on vagueness and First Amendment grounds, Respondents supply a laundry list of expressive activities that they assert are barred, or could reasonably be understood as barred, by the statute. Before addressing Respondents' constitutional claims, *amici* wish to focus on the precise language of § 2339B. The statutory language makes clear that while Congress intended to broadly prohibit Americans from aiding FTOs, many of the expressive activities listed by Respondents are not subject to the prohibition.

Section 2339B(a)(1) makes it unlawful to "knowingly provide[ ] material support or resources to a foreign terrorist organization" or to "attempt[ ] or conspire[ ] to do so." "Material support or resources" means:

> [A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

§ 2339B(g)(4) (incorporating definition from 18 U.S.C. § 2339A(b)(1)). The term "training" is further defined to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," 18 U.S.C. § 2339A(b)(2), while "expert advice or assistance" is further defined to mean "advice or assistance derived from scientific, technical, or other specialized knowledge." 18 U.S.C. § 2339A(b)(3). The statute also imposes limitations on the meaning of the term "personnel," including a provision stating that an individual shall not be considered to be working under an FTO's "direction and control" (and thus not considered to be providing "personnel" to the FTO) if he acts "entirely independently" of the FTO "to advance its goals and objectives." 18 U.S.C. § 2339B(h).

In attempting to convey what it meant by "material support or resources," Congress was extraordinarily detailed: it used more than 15 separate terms in explaining its intent. But the Ninth Circuit did not applaud the provision of a lengthy definition as a salutary effort to avoid confusion. Rather, it construed the definition of "material support or resources" as though it imposed 15 or more separate prohibitions, and then faulted Congress for failing to provide an adequate definition for each of those separate prohibitions. Pet. App. 19a-27a.

By construing the definitional section as though it multiplied the number of statutory prohibitions 15 fold, the Ninth Circuit failed to abide by a fundamental canon of statutory construction: *noscitur a sociis*, which counsels that a word is given more precise content by the neighboring words with which it is associated. *See*

Jarecki v. G.D. Searle & Co., 367 U.S. 207 (1961). Thus, for example, if a court determines that Congress intended that an activity would not constitute the provision of "training" as defined by § 2339A(b)(1), *noscitur a sociis* would make that determination relevant in deciding whether the same activity constitutes "expert advice or assistance." But the Ninth Circuit set about determining the meaning of each term used in § 2339A(b)(1) without any reference to the meaning of its neighboring words.

Respondents assert that this *seriatim* approach to statutory construction is appropriate because § 2339A(b)(1) uses the conjunction "or" in setting forth the definition of "material support or resources" – *e.g.*, an activity can constitute "material support or resources" if it is *either* "financial support" *or* "transportation." But this Court has routinely applied *noscitur a sociis* to statutory words appearing in a series even though they are connected by the word "or." Thus, when considering a vagueness challenge to 18 U.S.C. § 2252A(a)(3)(B) – which *inter alia* prohibits "advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]" child pornography – the Court recently applied *noscitur a sociis* in determining the intended meaning of the five listed verbs, notwithstanding that the verbs are connected with the conjunction "or." *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 1839 (2008). The Court explained that while the verbs "promotes" and "presents," when considered in isolation, "are susceptible of multiple and wide-ranging meanings," "commonsense" requires that they be afforded "narrowed" meanings in light of their use in association with the more limited verbs "advertises,"

"promotes," and "solicits." *Id.* The Court reasoned that the five verbs, when considered collectively, indicate that Congress sought to criminalize only those activities with a "transactional connotation." *Id.*

This canon of statutory construction is particularly pertinent to § 2339A(b)(1)'s use of the word "service." When used in isolation, the word "service" can be interpreted to encompass virtually any activity that might benefit another. But the numerous other words employed by Congress in defining "material support or resources" makes plain Congress's intention that "service" be understood as encompassing only those services that are similar in nature to the specific services enumerated in § 2339A(b)(1). The use of the word "including" following the word "service" is particularly significant; it indicates that the terms that follow are examples of the types of service (as well as tangible or intangible property) that meet the statutory definition.

The history surrounding the 2004 amendment that added the word "service" supports that understanding. Before 2004, § 2339A(b)(1) began with the phrase, "currency or monetary instruments." As part of the IRTPA amendments in 2004, Congress added the phrase, ". . . any property, tangible or intangible, or service, including . . ." immediately preceding "currency or monetary instruments." The reason for the amendment seems relatively clear: Congress was not intending thereby to expand the definition of "material support or resources" but rather to state explicitly what was already implicit in the statute: an action could satisfy the statutory definition regardless of the form it took (*i.e.*, regardless whether the action provided

tangible property, intangible property, or a service).

The *noscitur a sociis* canon also strongly supports the federal government's view that Congress did not intend § 2339B to bar actions taken "entirely independently" of an FTO, even when the actions are intended to "advance its goals or objectives." The quoted language comes from § 2339B(h), which was added to the statute in 2004 by IRTPA. While by its terms, § 2339B(h) defines what it means to provide "personnel" to an FTO, there is every reason to believe that Congress intended the definition to apply not just to "personnel" but across the board to all the terms set forth in § 2339A(b)(1). It would not make sense for Congress to have gone out of its way to explain that one who acts "entirely independently" of an FTO to advance the FTO's objectives cannot be charged with having provided "personnel" to the FTO, yet at the same time to have permitted that same person to be charged with having provided another one of the enumerated forms of "material support." Rather, *noscitur a sociis* suggests that Congress intended the terms set forth in § 2339A(b)(1) to be read similarly, such that "entirely independent" actions that are immunized from a "personnel" prosecution by § 2339B(h) would also be immunized from a "service" or an "expert advice or assistance" prosecution.

Section 2339B(a)(1) includes several other provisions that significantly limit its reach. For example, provision of "support or resources" is not prohibited unless it is "material," an adjective meaning "having real importance or great significance." *See Webster's New Collegiate Dictionary* (1981). Thus,

activities are not criminalized simply because they arguably provide a small degree of support to an FTO.[5] The statutory prohibition is limited to material support or resources that are provided "to" an FTO, thereby limiting the statute to situations in which there is some sort of direct interaction between the defendant and the FTO.[6] Moreover, the statute is inapplicable unless the defendant has acted "knowingly" *and* knows that the benefitted organization has been designated an FTO by the State Department.

With these limitations in mind, it is readily apparent that many of the hypothetical situations envisioned by Respondents do not constitute statutory violations. For example, the HLP Respondents wish to "advocate on behalf of the Kurdish people and the PKK before the United Nations and the United States Congress." Respondents Br. 10-11. Section 2339B imposes no limitations whatsoever on advocacy "on

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[5] Federal statutory law regularly uses the word "material" in this "great significance" sense. *See, e.g.*, 18 U.S.C. § 1621 (criminalizing perjury where the defendant has made statements under oath "regarding any material matter which he does not believe to be true"); 21 U.S.C. § 843(a)(4)(A) (prohibiting the furnishing of "false or fraudulent material information" in documents required under federal drug law); 26 U.S.C. § 6700(a)(2)(A) (criminalizing the making of a statement regarding a tax deduction or credit that is "false or fraudulent as to any material matter"). The Court has explained that inclusion of the word "material" is understood to "limit" the scope of the statute. *Neder v. United States*, 527 U.S. 1, 23 (1999).

[6] In this sense, use of the word "to" serves a function similar to § 2339B(h)'s exemption for "personnel" activity taken "entirely independently" of the benefitted FTO.

behalf of the Kurdish people," and advocacy on behalf of PKK is prohibited only to the extent that one acts under the "direction or control" of PKK. The Sangram Respondents are similarly free to "engage in political advocacy on behalf of Tamils living in Sri Lanka." *Id.* Permissible advocacy would include filing an *amicus curiae* brief in support of the FTO in a judicial proceeding, provided only that the brief is not filed under an FTO's direction or control.[7] Nor does the statute prohibit "independent" statements that one supports the cause of an FTO, deems oneself a member of the FTO, or otherwise wishes to be associated with the group.

Nor is there any basis for Respondents' assertions that § 2339B prohibits all dialogue with the leadership of an FTO. *Id.* at 46, 70. The statute prohibits actions that materially benefit an FTO; merely speaking with an FTO's leadership (and, for example, seeking to fact-check an anticipated human rights complaint, or urging the group to eschew violence and to seek peaceful resolution of its grievances) does not violate the statute because it cannot reasonably be understood as providing *material* support *to* the FTO.

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[7] Representing an FTO in court proceedings raises a closer question. The most reasonable interpretation is that Congress intended to permit attorneys to represent an FTO in a lawsuit challenging the State Department's decision to list the group as an FTO, given that Congress expressly authorized such lawsuits. *See* 8 U.S.C. § 1189(b)(1). Also, given that the U.S. Constitution protects the right to counsel in a criminal proceeding and that defense attorneys are viewed as officers of the court, it is fair to conclude that Congress did not intend to prohibit attorneys from defending an FTO or the leadership of an FTO in a criminal case.

Amici do not mean to diminish the broad scope of the prohibitions imposed by § 2339B. *Amici* share Congress's desire to diminish the threat created by terrorist groups by preventing those groups from looking to Americans for substantial assistance. But when addressing Respondents' constitutional claims, it is important to bear in mind the limitations that Congress has placed on the "material support" bar.

II. SECTION 2339B IS NOT VOID FOR VAGUENESS

A. Section 2339B Provides People of Ordinary Intelligence a Reasonable Opportunity to Understand What Conduct Is Prohibited

A statute is impermissibly vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).[8] Courts have stressed that because no set of words will convey precisely the same meaning to all people, all that is required to survive a vagueness challenge is that "it is clear what the ordinance *as a whole* prohibits."

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[8] A statute can also be impermissibly vague "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Id.* However, this second prong of vagueness analysis is not at issue here. Respondents point to nothing in the language of §§ 2339A and 2339B that encourages arbitrary and discriminatory enforcement, and do not assert that the federal government has a history of enforcing the statute in an arbitrary or discriminatory manner. Indeed, Respondents' pre-enforcement challenge does not point to *any* history of enforcement of the ban.

Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (emphasis added). Because we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Id.*

The Court has noted that where, as here, some portion of the conduct prohibited by the statute has an expressive component and thus implicates First Amendment values, the courts should apply a somewhat more stringent vagueness test. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). But "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). Moreover, the Court has been very reluctant to entertain facial vagueness challenges based on factual settings not presented by the case at issue: "speculation about possible vagueness in hypothetical situations not before the court will not support a facial attack on a statute when it is surely valid 'in the vast majority of intended applications.'" *Hill*, 530 U.S. at 733 (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960)).

In addressing Respondents' void-for-vagueness claim, the Ninth Circuit failed to focus on what § 2339B "as a whole" prohibits and instead focused on individual terms adopted by Congress as part of its effort to explain what constitutes "material support or resources." Indeed, while enjoining enforcement (with respect to Respondents) of three of the terms used in § 2339A(b)(1) to define "material support or resources," the Ninth Circuit simply failed to address whether § 2339B itself provides people of ordinary intelligence a

reasonable opportunity to understand what conduct it prohibits.

The language employed by Congress in prohibiting significant direct support for designated "foreign terrorist groups," when taken as a whole, easily meets the vagueness test described above. Section 2339B(a)(1) prohibits "knowingly" providing "material support or resources" to an FTO. It provides a detailed definition of the term "material support or resources." 18 U.S.C. § 2339A(b)(1). It elaborates on that definition by further explaining the meaning of three of the terms used in § 2339A(b)(1): "training" (§ 2339A(b)(2)), "expert advice or assistance" (§ 2339A(b)(3)), and "personnel" (§ 2339B(h). While one cannot glean from the statute "with mathematical certainty" what activities are prohibited, a person of ordinary intelligence should be able to discern whether this extraordinarily detailed statute covers an activity in which he proposes to engage. In general, activities are covered if and only if: (1) they involve direct interaction with an FTO (as opposed to independent activities designed to support the FTO or its goals); (2) they benefit the FTO in some way; and (3) the benefit provided is significant.[9] If those criteria are met, an activity is prohibited regardless whether the activity has an expressive component; § 2339B makes no

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[9] Thus the distinction (set forth in § 2339A(b)) between advice derived from general knowledge (permissible) and advice derived from scientific, technical, or other specialized knowledge (not permissible). Congress sought thereby to provide a clearer explanation regarding what constitutes "material" support. The more specialized the knowledge imparted to an FTO, the more likely it is to be deemed "material."

distinction between activities with an expressive component and those that lack such a component.[10] The statute contains only two exceptions: the supply of "medicine or religious materials" is not prohibited.

The analytical approach adopted by the Ninth Circuit – lengthy, discrete discussions of what is covered by each of the terms "service," "training," "expert advice or assistance," and "personnel" – is largely beside the point because the *only* activity prohibited by § 2339B is the provision of "material support or resources" to an FTO. So long as the meaning of that latter phrase is reasonably clear, it is less relevant whether (for example) "training" covers more activities or fewer activities than "expert advice or assistance."[11]

Some of the "expressive" activities in which Respondents wish to engage clearly constitute "material support or resources" while others clearly do not. For

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[10] *Amici* note that many activities involving the provision of material support to an FTO contain at least some expressive component. For example, donating goods or services to another generally is deemed an expression of support for the recipient. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976).

[11] The Ninth Circuit faulted Congress because "[t]here is no statutory definition of the word 'service.'" Pet. App. 25a. But given that the statute simply uses "service" to help define the prohibited activity, the appeals court's approach to void-for-vagueness analysis cannot be correct. One can always dig far enough back into the statutory definitions to find a word that has not itself been defined. *See also* the discussion of "service" *supra* at 15 (the word "service" is not on a par with other terms included in § 2339A(b)(1) but rather is used generically, with the terms that follow explaining the types of "services" that can qualify as "material support or resources").

example, the Sangram Respondents express a desire to provide expert advice and training in Tamil language, literature, arts, cultural heritage, and history. Nothing in § 2339B prevents them from doing so, even if some of those receiving the training happen also to be members of LTTE. Such expert advice and training could not reasonably be deemed to have been provided "to" LTTE unless the training sessions at issue were being run under the auspices of LTTE, or LTTE had arranged for such sessions in order to gain knowledge that would further the goals of LTTE. Thus, those wishing to impart their knowledge to the Tamil of Sri Lanka (including knowledge regarding international law, tsunami relief, or gaining United Nations support for the Tamil cause) have an easy way of doing so without running afoul of § 2339B: just make sure that one's actions are not being undertaken under the auspices of LTTE.

On the other hand, one of the activities proposed by the HLP Respondents clearly is covered by § 2339B: they wish to provide PKK leaders with expert training regarding how best to press PKK's political agenda, including expert training regarding how to approach international bodies for the purpose of negotiating a peace treaty with the government of Turkey. Assuming that PKK is really interested in receiving such expert advice from Fertig and the other HLP Respondents and assuming that the expert advice has value to PKK, then the proposed activity quite clearly is prohibited by the statute. There can be little question that Fertig's knowledge of international law and negotiating strategies qualifies as "expert advice or assistance"; the HLP proposes giving the advice directly "to" PKK

leaders; and, assuming they value the advice, the assistance to be provided is "material." For purposes of the void-for-vagueness analysis, it is irrelevant that the proposed expert advice does not directly further any terrorist activity; Congress has unequivocally determined that international terrorism "threatens the vital interests of the United States" and that any material support provided to terrorist groups facilitates that terrorism. *See* Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-243, Title III, Subtitle A, § 301(a)(1) & (7), 110 Stat. 1247, *codified at* 18 U.S.C. § 2339B *note*. Accordingly, Congress has determined that national security requires that *all* direct material support to groups determined by the federal government to be FTOs should be prohibited. *Id.* Congress determined that such donations of goods or services – even donations intended to further the FTOs non-terrorist activities – should be prohibited because donated resources used to cover the costs of non-terrorist activities free up other resources and thereby permit the organization to divert those other resources to terrorism. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134 (9th Cir. 2000).

Section 2339B's scienter requirement (limiting the statute's reach to those who "knowingly" provide material support to others they know to be terrorist groups or to have been designated as such by the State Department) eliminates whatever vagueness problems might otherwise exist, by assuring that the statute will not be applied to those who fail to understand its reach. *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (the constitutionality of an allegedly vague statute "is closely related to whether that standard incorporates a require-

ment of mens rea"). Of course, Respondents are well aware that PKK and LTTE are designated as FTOs and that § 2339B prohibits providing material support to those groups. Accordingly, there is little reason to be sympathetic to their claims that there may be some hypothetical situations to which § 2339B's application may be unclear.[12] The statute is broad, and its application (or non-application) to the support they wish to provide is clear.

B. The Ninth Circuit Improperly Incorporated First Amendment Considerations Into Its Vagueness Analysis

The Ninth Circuit's error extended beyond its misguided one-by-one examination of the various terms used to define "material support or resources." The appeals court's decision to strike down three of those terms was based on a misunderstanding of the vagueness doctrine.

The court held that even if a person of ordinary intelligence would understand what activities are prohibited by the challenged language of § 2339A(b)(1), that language is void for vagueness if the prohibited

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[12] The vagueness analysis does not change simply because there may be some hypothetical situations in which it is unclear whether the support provided is sufficiently "material" or the knowledge imparted is sufficiently "specialized." The mere fact that close cases can be envisioned does not render a statute vague. "The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 128 S. Ct. at 1846.

activities could "be read to encompass speech and advocacy protected by the First Amendment." Pet. App. 22a. The appeals court then proceeded to invoke this could-be-read-to-encompass-speech-and-advocacy doctrine as a basis for declaring "training," "other specialized knowledge," and "service" impermissibly vague. *Id.* at 22a, 24a, 25a.

That holding directly conflicts with numerous decisions of this Court, which hold that a statute is impermissibly vague (thereby violating due process rights) only if it: (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) defines a criminal offense with insufficient definiteness such that it encourages arbitrary and discriminatory enforcement. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

The Ninth Circuit's approach is not a vagueness analysis at all, but rather is a disguised First Amendment analysis. One properly begins a vagueness analysis by determining whether a challenged statute fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. If the statute provides such an opportunity, it is not impermissibly vague, regardless whether it arguably infringes on free speech rights. Any such argument should be determined based on a First Amendment analysis, not on a vagueness analysis.

III. SECTION 2339B DOES NOT VIOLATE THE FIRST AMENDMENT, WHETHER CHALLENGED FACIALLY UNDER OVER-BREADTH ANALYSIS, OR AS APPLIED TO SPECIFIC TYPES OF ACTIVITIES THAT RESPONDENTS WISH TO UNDERTAKE

The Ninth Circuit rejected Respondents' First Amendment challenge to § 2339B. The court held that their overbreadth challenge failed because the statute "is not aimed at interfering with the expressive component of [Respondents'] conduct but at stopping aid to terrorist groups," and because any instances of protected speech that may fall within the statute "are not substantial when compared to [its] legitimate applications." Pet. App. 28a-29a. The appeals court rejected Respondents' as-applied First Amendment challenge in a prior, *en banc* decision. *Humanitarian Law Project v. U.S. Dep't of Justice*, 393 F.3d 902 (9th Cir. 2004) (*en banc*).

A. As Applied to Respondents' Proposed Expressive Activities, § 2339B Does Not Violate the First Amendment

The appeals court's conclusion that § 2399B is content-neutral is correct. Respondents have presented no evidence suggesting that, in adopting the statute, Congress had any purpose in mind other than a desire to stop material aid to terrorist groups. Congress did not care what message Americans might wish to convey to FTOs; its sole desire was to prevent Americans from providing services/property that are of value to an FTO and that thus facilitate the FTO's operations (including,

either directly or indirectly, its terrorist operations).

Respondents' efforts to distinguish between expressive conduct and "pure speech" (*i.e.*, expression that takes the form of written or spoken words) are largely unavailing. Courts are somewhat more skeptical of government regulation of "pure speech" than of expressive conduct, *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), perhaps because they are more likely to suspect that regulation of "pure speech" is based on the content of what is being expressed. But where, as here, the evidence is unequivocal that the government's regulation of written/spoken words is unrelated to the thoughts being expressed, the distinction between regulation of expressive conduct and "pure speech" falls away.[13]

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[13] It is true that the statute distinguishes speech based on the degree to which the speech assists an FTO – speech is prohibited only if it provides "material" support to an FTO. But that type of distinction should no more be deemed "content-based" than is a regulation that regulates outdoor music based on its volume. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The material/non-material distinction is based on Congress's appraisal of the likelihood that the speech will facilitate terrorism, not on the ideas being expressed. As the Court has explained:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech is itself proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: A State might choose to prohibit only obscenity which is the most patently offensive *in its prurience* – *i.e.*, that which involves the most lascivious displays of sexual

Respondents are mistaken in their assertion that the First Amendment requires strict scrutiny of government regulation of activities that take the form of written/spoken words. As Justice Black, never known to be shy in espousing broad First Amendment protections, wrote 60 years ago in rejecting a First Amendment challenge to an injunction forbidding union picketing:

> It is true that the agreements and course of conduct here were in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech to make a course of conduct illegal merely because the conduct was initiated, evidenced, or carried out by means of language, either spoken, written, or printed.

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

The federal government regularly charges individuals with being accessories after the fact, in violation of 18 U.S.C. § 3, for providing advice to fleeing felons regarding how to evade capture. Such advice is no more inherently blameworthy than providing human rights training to the avowed enemies of the United States; in each instance, the speech, while innocuous in itself, thwarts government efforts to subdue criminals. Respondents are free to teach courses, open to the public, designed to assist students in negotiating peace

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activity.

R.A.V. v. St. Paul, 505 U.S. 377, 388 (1992).

treaties. *See,, e.g.*, Respondents Br. at 23. But they are not free to supply that expertise for the especial benefit of an FTO.[14] Thus, if Dr. Samuel Mudd wants to teach a course entitled, "Little Known Routes One Can Use to Leave Maryland and Cross the Potomac River Without Being Detected," the First Amendment protects his right to do so. But the First Amendment does not protect his right to supply that information privately to John Wilkes Booth, assuming that he knows Booth's status as a fleeing felon.

In support of their claim that § 2339B is not content-neutral, Respondents assert that the statute permits speech critical of an FTO but not speech "for the benefit of" an FTO. *Id.* at 20. That assertion is based on a false dichotomy. Americans are just as free to praise an FTO as they are to criticize it. All they are prohibited from doing is taking actions (including actions expressed through words) that involve direct interaction with a known terrorist group and that provide "material support" to the group. Respondents insist that their speech will not facilitate PKK's and LTTE's terrorism, but that assertion is contradicted by Congress's factual findings. If Respondents wish to

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[14] There is no merit to Respondents' assertion that they are unable to impart valuable information to Kurds and Tamils without working through PKK and LTTE. LTTE controls no territory within Sri Lanka at this time. PKK operates mainly out of northern Iraq. That portion of Iraq is largely autonomous and is governed by the democratically elected Kurdistan Regional Government (KRG), which has expressed considerable interest in assisting Kurds living in neighboring Turkey. *See* www.krg.org. Thus, to the extent that the HLP Respondents wish to assist Kurds living in Turkey, they can impart their specialized skills to the KRG.

challenge Congress's determination, they should take their case to the current Congress, not the courts.

Because § 2339B's regulation of expressive activities is content-neutral, such regulation is subject to intermediate First Amendment scrutiny. *United States v. O'Brien*, 391 U.S. 367 (1968). Under that standard, government regulation not intended to suppress disfavored speech but which nonetheless incidentally affects speech will be sustained:

> [I]f it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

The statute easily passes that test. The federal government has determined that PKK and LTTE engage in terrorism and that any "material" support provided to those groups will assist them in carrying out further terrorism. The government undoubtedly has a substantial interest in suppressing terrorism. Moreover, § 2339B is narrowly drawn to ensure that it does not unnecessarily interfere with speech. For example, it does not prohibit anyone from speaking out in favor of an FTO or its terrorist goals and does not prohibit anyone from becoming a member of an FTO or otherwise associating himself with the group.

Respondents' reliance on *Scales v. United States*, 367 U.S. 203 (1961), is misplaced. *Scales* held that the Smith Act did not criminalize mere membership in the Communist Party; it stated that any such interpretation would raise serious First Amendment concerns because it would interfere with associational rights. *Id.* at 224-25. No similar concerns are implicated here because § 2339B does not criminalize membership in or association with an FTO, but rather applies only to those who supply "material support" with full knowledge that the organization has been designated as an FTO.

If the Court nonetheless determines that application of § 2339B to any of Respondents' proposed activities would violate the First Amendment, an injunction should do no more than enjoin the government from enforcing the statute with respect to those activities. In the absence of an overbreadth finding, it would be inappropriate to prohibit the government from enforcing the statute (or any of its definitional terms) with respect to any other activities in which Respondents may wish to engage.

B. Section 2339B is Not Overbroad

The Ninth Circuit correctly rejected Respondents' overbreadth claim. In the absence of persuasive evidence from Respondents that § 2339B proscribes a substantial amount of speech activity in violation of the First Amendment, invocation of the overbreadth doctrine to permit a facial challenge to the statute is wholly inappropriate. As the Supreme Court has explained, although overbreadth adjudication serves an

important function of ensuring that overbroad laws are not permitted to "chill" constitutionally protected speech by those unwilling to risk prosecution under the law:

> There are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the "strong medicine" of overbreadth invalidation.

Virginia v. Hicks, 539 U.S. 113, 119-20 (2003) (quoting *Broadrick*, 413 U.S. at 615, 613 (1973)). Striking down the challenged statutory provisions on overbreadth grounds would have enormous negative impact on national security: it would deprive the federal government of the authority, for example, to criminally prosecute those who provide "expert advice or assistance" to terrorist groups by teaching them how to build bombs. *Amici* do not understand Respondents to argue that such expert advice or assistance is entitled to any constitutional protection; yet the result of the relief they seek would be to provide legal protection to such individuals.

Respondents have essentially conceded that § 2339B is not substantially overbroad by abandoning

the great majority of the claims (described above) that they initially pressed in the district court. For example, the Ninth Circuit rejected Respondents' claim that they have a First Amendment right to donate money and supplies to FTOs, and Respondents do not challenge that holding. The primary focus of § 2339B is support for terrorism, not speech. Thus, even if Respondents were able to hypothesize a few instances in which the statute prohibits protected speech, those instances cannot be deemed "substantial" relative to the scope of the law's plainly legitimate applications.

IV. SECTION 2339B PLAYS AN IMPORTANT ROLE IN PROTECTING NATIONAL SECURITY

Amici include retired military personnel with expertise in national security matters. They have first-hand knowledge of the grave threat to our Nation's security posed by foreign terrorist organizations. Section 2339B plays an important role in containing that threat. *Amici* urge the Court to take that important role into account when considering Respondents' constitutional challenge to the statute.

In addition to PKK and LTTE, 42 other groups have been designated FTOs by the Secretary of State.[15]

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[15] Information regarding the activities of those 44 FTOs are set forth in annual State Department reports. *See* Department of State, Office of the Coordinator for Counterterrorism, *Country Report on Terrorism 2008*, Chapter 6, "Terrorist Organizations," available at http://www.state.gov/s/ct/rls/crt/2008/122449.htm (last visited December 24, 2009). Among the other 42 FTOs are such well-known groups as al-Qaeda, HAMAS, and Hizballah. In the

If any significant portion of § 2339B is struck down, the ability of the federal government to prosecute those who supply training, specialized knowledge, personnel, and/or services to these 44 FTOs will be severely impaired. Supplying those resources strengthens the groups and thereby undermines U.S. interests, regardless whether those who do the supplying intend to limit their support to an FTO's "humanitarian" projects. As U.S. Senator John Kyle recently explained, "There is no such thing as 'good' aid to a terrorist organization, because all aid is fungible and can be converted to evil purposes, and because even humanitarian aid can be used by a terrorist organization to help it recruit new members." 153 Cong. Rec. S15876 (2007).

The Justice Department has determined that the "material support statutes" (18 U.S.C. §§ 2239A and 2239B) are "critical features of law enforcement's current approach to counterterrorism." Testimony of Deputy Assistant Attorney General Gregory Katsas, House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security (May 10, 2005). Targeting those who provide the logistical support for terrorist groups – whether in the form of cash, materials, or services – is critical because "[p]eople who perform these services and fill these positions may not

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years since it masterminded the 9/11 attacks in the United States that killed 3,000 people, al-Qaeda's operations have included numerous other attacks on civilian populations. HAMAS, which took control of Gaza from the Palestinian Authority in June 2007, has conducted repeated attacks on civilian targets in Israel. Hizballah's violent history includes the suicide truck bombings of the U.S. Embassy and U.S. Marine barracks in Beirut.

be bomb-throwers. But the frontline terrorists cannot operate without their supporters and their logistical support networks." *Id.* The Brief of the United States documents repeated instances in which the Justice Department has prosecuted individuals under the material support statutes for providing "training," "specialized knowledge," "personnel," and "services" to FTOs – the very provisions that Respondents seek to strike down on First and Fifth Amendment grounds.

This case was not filed because Respondents are actually confused about the reach of what they allege is an overly vague law. Rather, they filed suit because they wish to aid groups whose fights for human rights and ethnic self-determination they support. Congress and the Executive Branch have determined that such aid threatens the national security of the United States. *Amici* urge the Court not to second-guess that determination.

CONCLUSION

Amici curiae request that the Court reverse the judgment of the Ninth Circuit to the extent that it held certain portions of § 2339B void for vagueness, and affirm in all other respects.

Respectfully submitted,

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